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No. 96-317

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

In re THE HONORABLE
WILLIAM C. McCLAIN
Judge of the Vigo County Court,

Petitioner,

On Petition for a Writ of Certiorari to the
Supreme Court of Indiana

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner, The Honorable William C. McClain, Judge of Vigo County Court ("Judge McClain"), has two arguments in reply to the brief in opposition filed by the Indiana Commission on Judicial Qualifications ("Commission"). First, this case presents this Court with the "serious questions" reserved in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7 (1980). Those questions are of national importance and the subject of conflicting decisions regarding judicial discipline in state supreme courts across the country. Second, judicial disciplinary actions are adversarial proceedings of a quasi-criminal nature such that judges accused of misconduct cannot be punished for exercising

their Fourth Amendment right to be free from an unreasonable search or seizure, nor sanctioned for exercising their due process right to present a complete defense.

I. THIS CASE PRESENTS "SERIOUS QUESTIONS" REGARDING DUE PROCESS FOR JUDGES ACCUSED OF MISCONDUCT THAT ARE OF NATIONAL IMPORTANCE AND SUBJECT TO CONFLICTING DECISIONS

The Commission claims the Indiana Supreme Court's decision does not "present a noteworthy federal question that warrants review by this Court." Br. in Opp., p. 5. It maintains that there is no conflict between the decision below and any other court on a significant federal issue. *Id.* The Commission argues that the first question posed in the petition is not presented by this case because the Indiana Supreme Court's specific finding that Judge McClain was untruthful in this case did not reject the special masters' general finding that he has reputation for honesty. *Id.* at 6.

A. This Case Presents "Serious Questions" Previously Reserved By The Court

While the Commission focuses exclusively on Judge McClain's credibility, the special masters heard four days of testimony from 21 separate witnesses. At issue during the hearing was not only Judge McClain's credibility, but also the credibility of all witnesses including his chief accusers, Brad Kesler and Laura Hauser. As to the Commission's "star" witness, Brad Kesler, the special masters found that he "has a reputation for vindictiveness and retaliation" such that "[a]t least two witnesses in this matter were apprehensive of what actions Brad Kesler might take due to their testimony." Pet. App. 30a ¶ 1. They further found, "Brad Kesler has a reputation

for fabrication, exaggeration and untruthfulness," and his "demeanor while testifying before the Special Masters was not convincing." Pet. App. 30a-31a ¶¶ 2-3. Brad Kesler was "not a credible witness" to the special masters. Pet. App. 31a ¶ 4.

With regard to Laura Hauser's credibility, the special masters found she "initially did not know who sent the letter . . . and after talking to Brad, Laura suspected that Judge McClain had some involvement in the letter writing. Still later, in conversation with Lori Maley and Lisa McKeand, (as late as the fall of 1994 and the winter of 1994-95) Laura denied that Judge McClain was responsible for the letters." Pet. App. 31a ¶ 5. The special masters further found, "In a Federal Court Deposition in March of 1993, Laura also denied that Judge McClain had any involvement in the letters." Pet. App. 31a ¶ 6. They concluded their findings, "Laura Hauser's demeanor while testifying before the Special Masters was inconsistent." Pet. App. 31a ¶ 7.

Most importantly, the special masters found that the Commission had failed to prove its charges against Judge McClain by clear and convincing evidence. Pet. App. 31a-32a ¶¶ 1-4; Br. in Opp. 2. After hearing all the witnesses, after judging their demeanor and credibility, and after weighing all the evidence, the special masters rendered a decision favorable to Judge McClain. The three special masters found that Judge McClain had *not* "engaged in a pattern of harassment and abuse against a court employee" and had *not* "participated in a pattern of harassment of a court employee and her family, culminating in sending her a used condom" as asserted by the Commission in its "Questions Presented."

The Indiana Supreme Court did in fact reject the special masters' express credibility findings and recommendation in deciding to discipline Judge McClain. The Indiana Supreme Court generally construes findings liberally, consistent with the ultimate decision of the tribunal below, "It is incumbent upon this Court to liberally construe findings of fact *together*, consistent with the resulting judgment." *Buchonok v. Emerick*, 558

N.E.2d 1092, 1095 (Ind. 1990) (emphasis in original); *Evansville-Vanderburgh School v. Roberts*, 405 N.E.2d 895, 899 (Ind. 1980). If a statement in the special masters' findings is ambiguous, an appellate court "must read it to support the court's judgment." *Hacienda Mexican Restaurant of Kalamazoo Corp v. Hacienda Franchise Group*, 569 N.E.2d 661, 670 (Ind. Ct. App. 1991). Instead of construing the findings consistent with the recommendation made by the special masters, under *de novo* review the Indiana Supreme Court rejected the findings. In short, this case presents the "serious questions" reserved in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7 (1980).

B. The Question Is Important Nationally And Is The Subject Of Conflict

Contrary to the Commission's assertion, judicial disciplinary proceedings in Indiana do conflict with the procedures followed in other states. Many state supreme courts accord deference to the findings and recommendations of the bodies that receives the evidence and sees the witnesses. Several of these courts, in contrast to the Indiana Supreme Court, specificallydefer to the tribunals' assessment of witness demeanor and credibility. *Counsel on Probate Judicial Conduct re Kinsella*, 476 A.2d 1041, 1049 (Conn. 1984) ("We cannot assess the credibility of witnesses"); *Matter of Inquiry Concerning a Judge*, 462 S.E.2d 728, 731 (Ga. 1995) (the court gives "substantial consideration and due deference to the Commission's ability to evaluate the credibility of the witnesses who appear before it"); *In re Bennett*, 483 A.2d 1242, 1248-49 (Md. 1984) ("the court should give full consideration to [the report of the Commission], particularly with respect to the credibility of witnesses, where the testimony is conflicting"); *In re Baber*, 847 S.W.2d 800, 802 (Mo.1993) ("where credibility is at issue, we give substantial consideration and due deference to the commission's ability to judge the credibility of witnesses appearing before it"); *Disciplinary*

Action Against Grenz, 534 N.W.2d 816, 818 (N.D. 1995) ("Although our review is de novo, we accord due weight to the hearing body's findings because the hearing body had the opportunity to observe the demeanor of the witnesses"); *In re Schenck*, 870 P.2d 185, 197 (Or. 1984) ("Even on *de novo* review, determinations of credibility are given significant weight when based on the fact finder's perception of a witness's demeanor"); *In re Worthen*, No. 950536; *In re Buckley*, No. 950537, 1996 Utah Lexis 91, at *32 (Utah Oct. 22, 1996) ("Long history has taught the judiciary that the forum which hears conflicting evidence has a superior capability to resolve factual questions, particularly where witness demeanor is concerned").

Other states give consideration, deference or weight to the findings and recommendations of the tribunal that receives the evidence as to factual matters. *In re McAllister*, 646 So.2d 173, 177 (Fla. 1994); *In re Hill*, 568 A.2d 361, 365 (Vt. 1989). Several do so but paradoxically still proclaim they are applying a *de novo* standard of review. *Matter of Gumaer*, 867 P.2d 850, 851 (Ariz. 1994); *Matter of Inquiry Concerning Eads*, 362 N.W.2d 541, 550 (Iowa 1985); *Mississippi Commission on Judicial Performance v. Atkinson*, 645 So.2d 1331, 1334 (Miss. 1994); *Matter of Stoker*, 827 P.2d 986, 992 (Wash. 1992). Other state supreme courts will uphold factual findings unless they are clearly erroneous. *In re Jones*, 728 P.2d 311, 313 (Colo. 1986); *Hinton v. Judicial Retirement and Removal Commission*, 854 S.W.2d 756, 758 (Ky. 1993)

Many state supreme courts, like the Indiana Supreme Court, have *de novo* review in judicial disciplinary proceedings without any deference to the fact finder. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1339 (Alaska 1991); *In re Rome*, 542 P.2d 676, 684 (Kan. 1975); *In re Decuir*, 654 So.2d 687, 692 (La. 1995); *Matter of Benoit*, 487 A.2d 1158, 1161 n.1 (Me. 1985); *In re Seitz*, 495 N.W.2d 559, 561 (Mich. 1993); *In re Kelly*, 407 N.W.2d 182, 184 (Neb. 1987); *Matter of Seaman*, 627 A.2d 106, 110 (N.J. 1993); *Matter of Mazzei*, 618 N.E.2d

123, 124 (N.Y. 1993); *In re Murphy*, 726 S.W.2d 509, 515 (Tenn. 1987); *In re Sheppard*, 815 S.W.2d 917, 918 (Tex.Spec.Ct.Rev. 1991); *Matter of Starcher*, 457 S.E.2d 147, 150 (W.Va. 1995). Other states' supreme courts conduct an independent review of the evidence or make an independent evaluation of the evidence. *Mardikian v. Commission on Judicial Performance*, 709 P.2d 852, 854 (Cal. 1985); *Matter of Martinez*, 656 P.2d 861, 865 (N.M. 1982); *In re Nowell*, 237 S.E.2d 246, 252 (N.C. 1977); *Matter of Pekarski*, 639 A.2d 759, 760 (Pa. 1994); *Matter of Hauermann*, 240 N.W.2d 603, 606 (S.D. 1976).

A few state supreme courts permit the introduction of additional evidence during the independent review and evaluation of the record. *Matter of Rowe*, 566 A.2d 1001, 1006 (Del.Jud. 1989); *Idaho Judicial Counsel v. Becker*, 834 P.2d 290, 295 (Idaho 1992); *In re Miera*, 426 N.W.2d 850, 855 (Minn. 1988). Rhode Island permits the introduction of additional evidence during a review of the record on the law and facts. R.I. Gen. Laws. § 8-16-6 (1985).

In light of the significant number of judicial disciplinary proceedings occurring across the United States, the constitutional problem highlighted by this case will only magnify in time. *See* 17 Judicial Conduct Reporter (Winter-Spring 1996). Statistics on judicial conduct organizations' complaint dispositions for the reporting period 1994-95, reported in the *Judicial Conduct Reporter*, show that the organizations received approximately 11,281 complaints, and the organizations dismissed approximately 10,163 complaints without formal or informal action. *Id.* Sanctions imposed during the reporting period include 133 private censures, admonitions or reprimands, 65 public censures, admonitions or reprimands, 20 suspensions, 6 fines and 10 removals from office. *Id.* This case is important nationally and the subject of conflicting approaches in the states. The first question in the certiorari petition merits this Court's review.

II. PENALIZING A JUDGE FOR EXERCISING HIS CONSTITUTIONAL RIGHTS VIOLATES DUE PROCESS

The Commission argues that the Indiana Supreme Court did not penalize Judge McClain for asserting his Fourth Amendment right. Br. in Opp., p. 8. It claims that the state supreme court punished Judge McClain's "on-again-off-again agreement to take the blood test and his lengthy delay in providing the Commission with the written results of the DNA test performed by his own expert." *Id.* at 8-9. The Commission further argues, "Nothing in the Constitution prohibited the Indiana Supreme Court from considering . . . his fabricated defense, in sanctioninghim." *Id.* at 7. It claims that Judge McClain's "argument depends on his contention that he did not lie, although the Indiana Supreme Court found that he did." *Id.* at 8. The Commission argues, "In essence, McClain now asks this Court to re-try the factual accuracy of his defense." *Id.*

A. The Indiana Supreme Court Punished Judge McClain For Asserting His Right To Be Free From An Unreasonable And Intrusive Blood Test

A fair reading of the Indiana Supreme Court's opinion is that Judge McClain was punished for asserting his Fourth Amendment right against unreasonable searches and seizures. Pet.App. 11a-12a, 20a. Judge McClain's failure to come to an agreement with the Commission regarding the blood test cannot be a basis for punishing him when the Commission has the procedural tools at its disposal to obtain the information. A judge accused of misconduct should not be forced to waive constitutional rights. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney disciplinary actions are "adversary proceedings of a quasi-criminal nature").

Judge McClain did not delay providing the Commission with his own DNA report. The special masters heard from 21 witnesses over four days beginning on September 18, 1995 and concluding on September 21, 1995. Pet.App. 21a. At that time, Judge McClain did not have the results of his own blood test to confirm the Commission's test which had been provided approximately ten (10) days prior to the hearing. In October, 1995, Judge McClain advised the Commission that his own DNA test results were the same as those of the Commission, but that a written report could not be prepared until November. On November 6, 1995, the special masters entered their findings of fact and conclusions of law. Pet.App. 32a. On November 22, 1995, theCommission requested the production of Judge McClain's report. Judge McClain objected on December 8, 1995 noting that the hearing had been completed months before. On December 22, 1995, the Commission moved the Indiana Supreme Court to compel production of the report. Judge McClain responded on January 10, 1996, and the Commission filed a reply on January 16, 1996. On January 17, 1996, "a majority of the [Indiana Supreme] Court" entered an order compelling production by January 24, 1996. Judge McClain complied. Nothing in these proceedings provide a basis to impose additional discipline against Judge McClain.

B. The Commission's Argument Depends Upon The Indiana Supreme Court's Finding Reversing Credibility Findings That Judge McClain Lied, Even Though The Special Masters Who Heard And Saw Him Made A Contrary Credibility Finding

Judge McClain is not requesting that this Court "re-try" the factual assertions of his defense; rather, the Indiana Supreme Court cannot "re-try" witness credibility and demeanor without seeing or hearing the witnesses in question. More particularly, the Indiana Supreme Court cannot punish Judge McClain for

presenting a defense credited by the special masters. The Commission cannot be permitted to bootstrap the state supreme court's erroneous finding in a credibility and demeanor vacuum into a basis for additional discipline.

The special masters found that Judge McClain told the truth: "Judge McClain has a reputation in the community for truthfulness and honesty" and "Judge McClain has never used language contained in the letters in questions in front of his staff and has a 'Victorian Sense of Honor' towards women." Pet. App. 31a ¶¶ 8-9. They found that Tom McQueary sent the letters and placed the used condom in the letter to Laura Hauser. Pet. App. 30a ¶ 46-47. JudgeMcClain cannot be punished consistent with due process for presenting a complete defense.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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